Office - Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

GEORGE E. AUSTIN, Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC B. HENSON
Deputy District Attorney
(Counsel of record)
ANDREW R. ROGOFF
Attorney-in-Charge,
Special Litigation
EDWARD G. RENDELL
District Attorney
Philadelphia County

1300 Chestnut Street
Philadelphia, PA 19107
(215) 875-6010

TABLE OF CONTENTS

	Page
Table of Authorities	ii-iii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	3
Statement of the Case	3-8
Reasons for Denying the Writ	8-15
Conclusion	16

TABLE OF AUTHORITIES

	Page
Federal Cases:	
Barclay v. Florida, 463 U.S. 939, reh. denied, 104 S.Ct. 209 (1983)	15
Beck v. Washington, 369 U.S. 541, reh. denied, 370 U.S. 965 (1962)	15
Bowe v. Scott, 233 U.S. 658 (1914)	12
Brinkerhoff-Faris Trust Savings Co. v. Hill, 281 U.S. 673 (1930)	11
Crowell v. Randell, 10 Pet. 368 (1836)	13
Grayson v. Harris, 267 U.S. 352 (1925)	15
Illinois v. Gates, 462 U.S. 213, reh. denied, 104 S.Ct. 33 (1983)	12
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	12
Sandstrom v. Montana, 442 U.S. 510 (1979)	11
Strickland v. Washington, 104 S.Ct. 2052 (1984)	7,9, 10,11,13

United States v. Cronic, 104 S.Ct. 2039 (1984) 7,9, 10,11

Webb v. Webb, 451 U.S. 493 (1981) 11

Pennsylvania Cases:

Commonwealth v. Clemmons, 479 A.2d 955 (Pa. 1984) 13

Commonwealth v. Cooper, 317 Pa. Super. 607, 464 A.2d 516 (1983) 4

Commonwealth v. Hayes, 270 Pa. Super. 380, 411 A.2d 769 (1979) 15

Commonwealth v. Miller, 495 Pa. 177, 433 A.2d 1 (1981) 13

Commonwealth v. Nunez, 312 Pa. Super. 584, 459 A.2d 376 (1983) 4

Federal Constitution, Statutes & Rules:

U.S. Const. Amend. VI 2

28 U.S.C. §1257(3) 2

U.S. Sup.Ct.R. 21.1(h) 8,9

Pennsylvania Statutes and Rules:

18 Pa.C.S. §308 14

42 Pa.C.S. §9541-9551 15

Pa.R.A.P. 1123(b) 10

OPINIONS BELOW

The Opinion and Supplemental Opinion of the trial judge, the Honorable Albert F. Sabo, are reproduced at Petitioner's Appendices C and D. The unpublished memorandum opinion of the Pennsylvania Superior Court, Commonwealth v. Austin, No. 494 Philadelphia 1982 (Pa. Super. filed 3/16/82), is reproduced at Petitioner's Appendix B; the per curiam order is reported at 473 A.2d 665 (Pa. Super. 1984). The Pennsylvania Supreme Court refused allowance of appeal from the Superior Court's disposition of Austin's appeal. Commonwealth v. Austin, Petitioner, No. 208 E.D. Allocatur Docket 1984 (Pa. filed 7/2/84) (per curiam) (copy of order reproduced at Petitioner's Appendix A).

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. §1257(3). For the reasons stated below, petitioner has not properly invoked this Court's jurisdiction.

QUESTION PRESENTED

Whether this Court, despite petitioner's failure to raise the issue in the Supreme Court of Pennsylvania, and despite the availability of state collateral review to test the effectiveness of prior counsel, should review petitioner's first degree murder conviction because the state courts failed to anticipate and apply Strickland v. Washington, 104 S. Ct. 2052 (1984), and United States v. Cronic, 104 S. Ct. 2039 (1984), to his claim of ineffective assistance of counsel.

CONSTITUTIONAL PROVISION INVOLVED

For the first time in these proceedings, petitioner invokes the Sixth Amendment to the United States Constitution. This Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Following a jury trial in the Philadelphia Court of Common Pleas, petitioner was found guilty of first degree murder and conspiracy for the bestial slaying of a nineteen year old graduate of the Philadelphia Police Academy. The evidence demonstrated that petitioner and his confederates brutally beat and stabbed the victim, bound him with electrical cord, stuffed him into a car trunk and dumped him off a bridge into

a creek.[1]

Ben W. Joseph, Esquire, represented petitioner at trial. Once petitioner challenged Mr. Joseph's effectiveness, the trial court appointed Mark E. Kogan, Esquire, for post-verdict motions. The trial court conducted an evidentiary hearing, at which petitioner called Mr. Joseph to testify concerning four major claims of improper representation:

1. His failure to file a pre-trial motion to suppress;

2. His failure to accept a proferred plea bargain;

3. His failure to argue that petitioner had not caused the victim's death; and

4. His decision to call a previously convicted co-defendant as a witness.

---

1. The murder convictions of two co-conspirators have been affirmed. Commonwealth v. Cooper, 317 Pa. Super. 607, 464 A.2d 516 (1983); Commonwealth v. Nunez, 312 Pa. Super. 584, 459 A.2d 376 (1983). A third did not appeal from his manslaughter conviction.

Under Pennsylvania law, petitioner bore the burden of establishing (1) that trial counsel's omissions were without any reasonable basis to effectuate petitioner's interests and (2) that a more competent strategy would have had a substantially greater chance of success. Supplemental Opinion, Sabo, J., at Petitioner's Appendix D at A-14. Crediting Mr. Joseph's testimony,[2] the trial court found no fault in his

---

2. Mr. Joseph stated that he (i) filed no motion to suppress because there was no basis for such a motion and that petitioner concurred in that decision (N.T., February 2, 1982, 10); (ii) urged petitioner to plead guilty to third degree murder - as offered by the prosecution - but that petitioner rejected the advice (id., 12); (iii) employed the very strategy of emphasizing the prosecutions's inability to prove more than petitioner's mere presence at the scene (id., 21); and (iv) called co-defendant Cooper at petitioner's insistence (id., 20).

representation of petitioner.

On direct appeal to the Superior Court of Pennsylvania, petitioner again raised the causation issue, as well as three new claims of ineffective assistance. The Superior Court, in an unpublished memorandum opinion, found, with regard to the causation claim, "that trial counsel did argue to the jury the same theory which [petitioner] claims his counsel did not pursue." Commonwealth v. Austin, No. 494 Philadelphia 1984 (Pa. Super. filed 3/16/84) (unpublished memorandum opinion); Petitioner's Appendix B at A-6. Petitioner had presented no evidence on the three other claims at the post-verdict evidentiary hearing. Because of this procedural default, the Superior Court found "the record... is bereft of any basis upon which relief may be granted." Id. at A-7.

Petitioner, still represented by Mr. Kogan, next sought discretionary review in the Supreme Court of Pennsylvania. He again contended that trial counsel was ineffective for failing to pursue the causation theory of defense and tried to raise those issues upon which he had made no record in the trial court. Petitioner did not, however, refer to any federal case or Constitutional provision in his request for review. Petitioner did not contend that the Pennsylvania ineffectiveness standard failed to protect his federal Constitutional rights.

While his Petition for Allowance of Appeal was pending in the state's highest court, this Court handed down Strickland v. Washington, 104 S. Ct. 2052 (1984), and United States v. Cronic, 104 S. Ct. 2039 (1984). Petitioner did not amend his request for review, nor seek reargument after review was declined, on the basis of

these decisions. As throughout the post-verdict and appellate proceedings, petitioner relied exclusively on settled state ineffectiveness law. Petitioner, represented by new counsel, now seeks review by this Court.

REASON FOR DENYING THE WRIT

Petitioner has Improperly Invoked this Court's Jurisdiction: His Claim was Neither "Pressed Nor Passed Upon" in the State Courts.

Petitioner seeks review of issues either raised for the first time in these four year old proceedings, or not properly preserved through the state appellate process. Petitioner, therefore, is unable, as required by this Court's Rules, to "specify [when] the federal questions sought to be reviewed were raised [below]." U.S. Sup.Ct.R. 21.1(h). Since his federal question was not timely and

properly raised, petitioner has improperly invoked this Court's jurisdiction and his petition should be dismissed. Id.

Before petitioning this Court for certiorari to review an unpublished memorandum opinion of an intermediate Pennsylvania appellate court, petitioner never presented his sole claim to the Supreme Court of Pennsylvania. He contends that the Pennsylvania courts ignored Strickland v. Washington, 104 S. Ct. 2052 (1984), and United States v. Cronic, 104 S. Ct. 2039 (1984), although he never asked those courts to assess his claims in light of Strickland and Cronic. By not affording the lower courts an opportunity to rule on this issue, petitioner forfeited his right, for the present, to review by this Court.

Although the Strickland and Cronic opinions were handed down two months after

the Superior Court's affirmance of petitioner's conviction, they preceded by almost the same amount of time the Pennsylvania Supreme Court's denial of his Petition for Allowance of Appeal. That petition[3] never referred to the United States Constitution nor to any federal court decision, and never questioned whether the Pennsylvania ineffectiveness standard violated the Sixth Amendment to the United States Constitution. Petitioner did not bring Strickland and Cronic to the attention of the Pennsylvania Supreme Court, and he did not seek reconsideration of that court's denial of his petition, as permitted under Pa.R.A.P. 1123(b) when "intervening

---

3. For this Court's convenience, the Commonwealth has lodged a copy of the Petition for Allowance of Appeal with the Clerk.

circumstances of substantial or controlling effect" arise.[4]

Petitioner failed to refer the state courts to any federal case or constitutional provision and instead requested review under a settled state standard. He, therefore, is barred from seeking relief in this Court. Webb v. Webb, 451 U.S. 493 (1981) (dismissing, for want of jurisdiction, writ of certiorari previously granted where record below did

---

4. Even if raised for the first time in a petition for rehearing in the state's highest court, a federal issue may thus be preserved for review by this Court. Brinkerhoff-Faris Trust Savings Co. v. Hill, 281 U.S. 673, 677-78 (1930). Of course, if petitioner had preserved his present claim below, this Court could remand this case to the Supreme Court of Pennsylvania for consideration in light of Strickland and Cronic. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 527 (1979).

not affirmatively show reference to any constitutional clause or federal cases, despite petitioner's use of phrase "full faith and credit"); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) (claim of taking without "due process of law," which does not refer to federal Constitution, does not state federal claim). Petitioner has disregarded a jurisdictional barrier which is based upon the need for a proper record for appellate review, and upon "due regard for the appropriate relationship of this Court to state courts." McGoldrick v. Compagnie Generale Transatlantic, 309 U.S. 430, 435-36 (1940). Questions "not pressed nor passed upon" below will not be considered for the first time on certiorari. Illinois v. Gates, 462 U.S.

213, reh. denied, 104 S.Ct. 33 (1983); Crowell v. Randell, 10 Pet. 368 (1836).[5]

---

5. Petitioner's previous counsel could reasonably have concluded that the supposed conflict between the Pennsylvania and current federal ineffectiveness standards was too insubstantial to benefit his client. Under the state standard, as under Strickland, petitioner bore the initial burden of showing professional incompetence. The state trial court found that petitioner failed to meet this burden with regard to the only claim preserved for review by the state appellate courts. Under the state standard, moreover, petitioner's burden to show prejudice was less than under Strickland: he had to show only that the omitted strategy would have had a substantially greater potential for success. Compare Commonwealth v. Clemmons, 479 A.2d 955, 957-58 (Pa. 1984); Commonwealth v. Miller, 495 Pa. 177, 181, 433 A.2d 1, 3 (1981) and Supplemental Opinion, Sabo, J., Petitioner's Appendix D at A-14 with Strickland v. Washington, supra at 2068 (requiring reasonable probability, sufficient to undermine confidence in the outcome, that, but for the ommission, the result would have been different).

In addition to asserting, for the first time, a conflict between federal and state ineffectiveness standards, petitioner raises issues that are wholly inappropriate for review by this Court. For example, he argues (i) without any record support, and for the first time at any stage, that the jury saw him in prison garb and that trial, post-verdict and appellate counsel incompetently failed to raise the issue (Petition, 9, 11); (ii) that the defense of intoxication[6] - which could have reduced the degree of murder - should have been made, despite petitioner's contradictory assertion of innocence through his causation-mere presence defense (Petition, 10-11); and (iii) that the Superior Court misinterpreted state law on accomplice liability (Petition, 10).

---

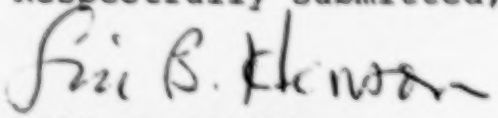
6. 18 Pa.C.S. §308

This Court sits neither to find facts, Grayson v. Harris, 267 U.S. 352, 358 (1925), nor to correct errors of state law. Barclay v. Florida, 463 U.S. 939, reh. denied, 104 S.Ct. 209 (1983); Beck v. Washington, 369 U.S. 541, 555, reh. denied, 370 U.S. 965 (1962). To the extent that petitioner is aggrieved by his various attorneys' efforts in his behalf, by their failure to allege each other's incompetence or by the Superior Court's failure to apply the "correct" ineffectiveness standard, he may still raise all these issues and create a record for appeal with a petition under the state Post Conviction Hearing Act, 42 Pa.C.S. §§9541-9551, esp. §9543(3)(vi), (xii); See, e.g., Commonwealth v. Hayes, 270 Pa. Super. 380, 411 A.2d 769 (1979). Petitioner may not substitute a petition for writ of certiorari for the orderly course of litigation readily available to him.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,



ERIC B. HENSON
Deputy District Attorney
(Counsel of record)
ANDREW R. ROGOFF
Attorney-in-Charge,
Special Litigation
EDWARD G. RENDELL
District Attorney
Philadelphia County

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE E. AUSTIN, Petitioner	:	OCTOBER TERM, 1984
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	NO. 84-537

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Respondent hereby certify that I have served three (3) copies of this Brief for Respondent in Opposition to Petition for Writ of Certiorari by mail delivery upon counsel for petitioner, Stanford Shmukler, Esquire, Packard Building, 24th Floor, Philadelphia, PA 19102.

Eric B. Henson
ERIC B. HENSON

Sworn to and subscribed before me this 17th day of December, 1984.

Joyce N. White
NOTARY PUBLIC

JOYCE N. WHITE
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1987